STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL J. JESTILA,

Plaintiff-Appellant-Cross-Appellee,

v

JACK E. MORRIS, JR., MARY LOU MORRIS, JANET LYNN LAMPI, BROOKE LAMPI MORRIS, and KIRSTIN LAMPI MORRIS,

Defendants-Appellees-Cross Appellants.

UNPUBLISHED
May 31, 2007

No. 274918
Houghton Circuit Court
LC No. 05-013018-CK

Before: Schuette, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's order granting defendants' motion for summary disposition and denying plaintiff's motion for summary disposition. Defendants cross-appeal, challenging the trial court's denial of their motion for sanctions in that same order. We affirm.

I. FACTS

This dispute concerns the ownership of an enclosed, elevated walkway, which connected the second floors of plaintiff and defendants' adjacent buildings. Kirkish Furniture, Inc. (Kirkish), originally owned the two adjacent buildings in Houghton, Michigan. The buildings, originally a furniture store and warehouse, were connected by an elevated wooden walkway between the second floors of the buildings. The walkway extended over the private alley between the buildings, and the property line dividing the buildings is located in the center of the alley. A steel door closed off the walkway from the warehouse and could be locked on the walkway side.

On February 21, 1995, Kirkish sold the warehouse building to Jacqueline Huntoon, who then sold the building to defendants Jack E. Morris, Jr. and Janet Lynn Lampi. A series of conveyances were made, and title to the warehouse building ultimately vested in Mr. Morris's mother, Mary Lou Morris, and his daughters, Brooke Lampi Morris and Kirstin Lampi Morris.

In October 1995, Kirkish sold the vacant furniture store to plaintiff. Plaintiff received a warranty deed for the furniture store and took possession of the building and the walkway, even

though plaintiff concedes that the deed never specifically mentions the walkway. Plaintiff proceeded to remodel and use the walkway as a coffee/smoke shop.

In October 2004, after providing advance notice to plaintiff, defendants removed, with all proper permits, the portion of the walkway extending over their property. In August 2005, plaintiff filed the instant action, alleging trespass and seeking to quiet title to the space that used to be the walkway. On October 17, 2006, defendants moved for summary disposition and for imposition of sanctions, alleging that plaintiff knew, or in the exercise of reasonable care, should have known, that he had no claim to the portion of the walkway that extended over defendants' property. Plaintiffs filed a cross-motion for summary disposition on October 31, 2006.

The lower court granted defendants' motion for summary disposition on November 15, 2006 and denied defendants' motion for sanctions. Plaintiff now appeals the portion of the trial court's order granting defendants' motion for summary disposition, and defendants cross-appeal the portion of the order denying their motion for imposition of sanctions.

II. SUMMARY DISPOSITION

Plaintiff argues that the trial court erred in granting defendants' motion for summary disposition because he is the owner of the walkway. We disagree.

A. Standard of Review

We review a grant or denial of a motion for summary disposition de novo. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). The evidence is viewed in a light most favorable to the opposing party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Summary disposition is supported when there is no genuine issue of material fact. *West*, *supra* at 183. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id*.

B. Analysis

Viewing the facts in the light most favorable to plaintiff, we conclude that defendants' motion for summary disposition was properly granted.

Neither the deed that conveyed the warehouse to defendant, nor the deed that conveyed the furniture store to plaintiff, specifically mentioned the walkway spanning the alley dividing the two properties. As such, plaintiff cannot claim ownership by grant of the walkway, since the walkway is not mentioned anywhere in the granting deeds.

Plaintiff also asserts that he owns the walkway under the language of the purchase agreement between himself and Kirkish, which states:

> All improvements and appurtenances to the above land are included in this sale, including all driveways, roads, streets and alleys in and adjacent to the Premises; all buildings, structures septic systems, sewer and water lines and utility hook ups located on or in the above land; and all fixtures which are, or appear to be,

permanently attached to the Premises.

Plaintiff argues that the walkway is a fixture of the furniture store building, but not of the warehouse, and thus was included in the sale to plaintiff, such that plaintiff acquired title upon completion of the sale. We disagree.

"[A]n item is a fixture if (1) it is annexed to realty, (2) its adaptation or application to the realty is appropriate, and (3) it was intended as a permanent accession to the realty." *Fane v Detroit Library Comm*, 465 Mich 68, 78; 631 NW2d 678 (2001). Here, the walkway is not a fixture of the furniture store building. Undoubtedly, the walkway is annexed to the store building. When the walkway was built between the two buildings, it connected a warehouse to the retail store. This seems to be an appropriate use of the walkway as it was built. Additionally, the walkway was intended to be permanent, built during part of a downtown revitalization movement in the 1980's. However, the walkway, under the test outlined above, is a fixture of both the store building and the warehouse building, being annexed to both. Thus, neither party can claim that the entire walkway is a fixture of solely his own real property. Further, "the fixtures analysis is limited to items of personal property that have a possible existence apart from realty." *Id.* So, even if plaintiff was able to prove that his purchase agreement is the only purchase agreement that included fixtures of the property being sold, the walkway does not stand on its own absent the existence of the two buildings.

Further, plaintiff does not own the walkway by adverse possession. MCL 600.5801 states that to establish a claim to lands by adverse possession, one must have been in possession of the land for 15 years. Adverse possession requires a showing of "clear and cogent proof that possession has been actual, visible, open, notorious, exclusive, continuous, and uninterrupted for the statutory period of fifteen years." *Kipka v Fountain*, 198 Mich App 435, 439; 499 NW2d 363 (1993). In this case, the possession at issue is not that of land, but an elevated walkway spanning above two owners' adjacent property. The trial court found that there is no claim for adverse possession here because the plaintiff did not exclusively possess the property for at least 15 years when he sought to quiet title to defendants' half of the walkway. We agree. There is no doubt from the record that defendants were aware of plaintiff's use of the walkway, given its use as a coffee and smoke shop, but without title to the entire walkway, plaintiff had no claim of right upon the walkway absent a showing of adverse possession.

Plaintiff argues instead that this case is similar to that of an implied easement. "To establish an implied easement three things must be shown: (1) that during the unity of title an apparently permanent and obvious servitude was imposed on one part of an estate in favor of another, (2) continuity, and (3) that the easement is reasonably necessary for the fair enjoyment of the property it benefits." *Schmidt v Eger*, 94 Mich App 728, 731; 289 NW2d 851 (1980). When the walkway was built, both buildings affected were owned by Kirkish. "If a person owns two adjacent tracts of land and imposes a servitude on one tract for the benefit of the other, there exists only a quasi-easement that may ripen into a full easement when one of the tracts is conveyed." *Id.* at 736-737. Thus, for the implied easement argument to be successful, plaintiff must show that the purchaser of either building purchased the building subject to an implied easement for the benefit of the adjacent owner. In this case, this is not an implied easement because the two buildings were owned by Kirkish before plaintiff's purchase, and there was no continuous use of the walkway as it was built. Rather, plaintiff turned the walkway into a coffee shop. This use of the space is not reasonably necessary for the fair enjoyment of the property it

benefits—a coffee shop in the walkway is not necessary for plaintiff to enjoy the use of the retail building.

Additionally, without sole ownership of the walkway, plaintiff cannot claim trespass. "A trespass is an unauthorized invasion upon the private property of another." *American Transmission, Inc v Channel 7 of Detroit, Inc*, 239 Mich App 695, 705; 609 NW2d 607 (2000) (emphasis added). Accordingly, defendants' demolition of their half of the walkway cannot be a trespass because plaintiff had no valid ownership right in the property.

Finally, plaintiff argues that defendant Jack Morris cannot be a bona fide purchaser because he had at least constructive notice that plaintiff was in possession of the walkway at the time he purchased the building. Plaintiff cites to *Smelsey v Guarantee Finance Corp*, 310 Mich 674; 17 NW2d 863 (1945), to support this proposition. But that case states that the possession of property by another is an indication that there may be a defect in title that precludes purchaser from taking clear title to the land. *Id*. at 680-681. In this case, defendant, had he inspected the property, would have seen that plaintiff was in possession, but upon further inquiry would have learned that the title to the property was clear. Defendant was indeed a bona fide purchaser because there is no defect in the title of the property he purchased from Huntoon. We further note that merely claiming ownership over the walkway is insufficient to preclude defendant from enjoying his own property.

For all of these reasons, we conclude that the trial court did not err in granting defendants' motion for summary disposition.

III. SANCTIONS

On cross-appeal, defendants argue that the trial court erred in denying them an award of sanctions under MCL 600.2591 and MCR 2.114 because plaintiff's claim was frivolous. Again, we disagree.

A. Standard of Review

We review a trial court's finding that a claim or defense was frivolous under the clearly erroneous standard. *Szymanski v Brown*, 221 Mich App 423, 436; 562 NW2d 212 (1997). "A decision is clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made." *Id.*

B. Analysis

Under MCL 600.2591, a claim is frivolous if plaintiff's "primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party," or if plaintiff "had no reasonable basis to believe that the facts underlying that party's legal position were in fact true," or if plaintiff's "legal position was devoid of arguable legal merit."

Defendants argue that the trial court should have imposed sanctions in this case because plaintiff failed to advance a position of arguable legal merit. Additionally, defendants claim that had plaintiff conducted a reasonable inquiry into the title history of the buildings and walkway, plaintiff would have known that a claim based on adverse possession would fail. Conversely, plaintiff argues that his argument—that MCL 600.5801 does not apply to this case—was of

arguable legal merit, and that conducting a title search would not have changed plaintiff's legal strategy.

We conclude that the trial court did not clearly err in refusing to award sanctions in this case. Plaintiff's argument, which centered on the applicability of MCL 600.5801 to the property in question, was not completely devoid of legal merit. Further, plaintiff's claim is not rendered frivolous just because the trial court disagreed with it and granted defendants' motion for summary disposition. See *Travelers Ins v U-Haul of Michigan, Inc*, 235 Mich App 273, 290; 597 NW2d 235 (1999) (concluding that an erroneous claim does not automatically give rise to a frivolous claim).

We also reject defendants' argument that sanctions were mandatory in this case. "The imposition of a sanction under MCR 2.114 is mandatory upon the finding that a pleading was signed in violation of the court rule or a frivolous action or defense had been pleaded." *Schadewald v Brule*, 225 Mich App 26, 41; 570 NW2d 788 (1997). Here, because plaintiff's claim was not frivolous, sanctions were not mandatory.

Affirmed.

/s/ Bill Schuette
/s/ Peter D. O'Connell
/s/ Alton T. Davis